# Petition

81-1230

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

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STEVEN MICHAEL JOHNSON,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

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PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE
STATE OF MARYLAND

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## QUESTION PRESENTED FOR REVIEW

Whether the granting of a Motion by the prosecution in a felony trial in a state court to amend its bill of particulars over the defendant's objections just prior to the defendant's opening of its case where the defense was alibi to change the time when the crime occurred from 5:45 P.M. - 8:00 to 3:00 P.M. without giving the defendant time to prepare a defense for the new time frame in a situation where defense counsel failed to ask for a short continuance at the time of the making of said Motion violated the 14th Amendment to the Constitution of the United States of America by denying the defendant of his liberty without due process of law.

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

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PETITION FOR CERTIORARI TO
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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Steven Michael Johnson, petitioner, by his attorney, Charles S. Vizzini, respectfully prays that a Writ of Certiorari issue to review the decision of the Court of Appeals of the State of Maryland filed on November 3, 1981.

## OPINIONS BELOW

The order from the Court of Special Appeals of Maryland denying defendant's appeal from the Circuit Court of Charles County, Maryland was filed on August 10, 1981.

The Order from the Court of Appeals of Maryland denying petitioner's petition for a Writ of Certiorari was filed on November 3, 1981.

Both orders are attached hereto as appendices. They were unreported.

## JURISDICTION

Jurisdiction is invoked pursuant to Rule 20.1 of this Court and 28 U.S.C. 1257.

## CONSTITUTIONAL PROVISION INVOKED

14th Amendment of the Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

On July 11, 1980, the defendant, Steven Michael Johnson, was indicted on the following charges, to wit,

1st Count - Sexual Offense - 1st Degree
2nd Count - Sexual Offense - 2nd Degree
3rd Count - Sexual Offense - 2nd Degree
4th Count - Sexual Offense - 1st Degree
5th Count - Sexual Offense - 2nd Degree
6th Count - Sexual Offense - 2nd Degree
7th Count - Sexual Offense - 3rd Degree
8th Count - Sexual Offense - 3rd Degree
9th Count - Unnatural and Perverted Sexual Practice
10th Count - Kidnapping Child Under Sixteen
11th Count - False Imprisonment
12th Count - Assault with Intent to Disable
13th Count - Assault and Battery

He was tried without a Jury before Judge

Bowling of the Circuit Court of Charles County, Maryland on October 21, 22, 1980 and found guilty of Counts 1, 10, 13.

On November 26, 1980, a Motion for a new trial was heard and denied. The defendant was thereupon sentenced to life imprisonment on Count 1 and on Count 10 for 20 years and on Count 13 for 10 years. The latter two sentences were to run concurrently with the sentence imposed for Count 1. One of the grounds stated in said Motion was the question presented in this petition.

An appeal was taken at the September Term (1981). Brief Response and Reply were filed. The case was argued on June 18, 1981. Counsel for petitioner herein represented petitioner for the first time on that appeal and has represented him since then. On August 10, 1981, an opinion was filed denying the appeal.

Petition for Certiorari was filed in the Court of Appeals of the State of Maryland on

September 24, 1981. After answer thereto, an order was filed on November 3, 1981, denying that Writ.

## ARGUMENT

The trial (non-jury) began on October 21, 1980. Defendant was defended by counsel other than counsel on this appeal. At that time, in his opening statement, counsel advised the court (and the State) that his defense was alibi.

The State concluded its case in one day. On the morning of the following day, just before defendant was to open its case, the State moved to amend its bill of particulars to conform to the proof, i.e. to allege that the crime occurred at 3 P.M., instead of between 5:45 and 8:00 P.M. The defense objected. The only justification offered by the State was that one of the defense alibi witnesses had begun his account of defendant's absence from the scene at 2:00 P.M.

The court found from this that there was

an absence of a showing of prejudice to the defendant!

The entire colloquy regarding Defense's objection to this amendment is set forth below in haec verba (TR 240-241).

> MR. WEINER: If it please the Court, I would have to object to that. And quite frankly, that is, I think it is fairly clear to Your Honor what is the crux of our case, is that Mr. Johnson wasn't anywhere near the scene of this event.
>
> Pursuant to that, I did request a Bill of Particulars, and Mr. Braun answered it, and states the time to be 5:45, P.M. and 8:30 P.M. Therefore, that my efforts were concentrated in that period of time, and back timing it does work to the prejudice of the defendant. I feel it is an alibi case, and the time is crucial.
>
> It is certainly not an amendment of little substance. It is actually an amendment of quite some substance. And we would object to any amendment at this time.
>
> MR BRAUN: I would only have one comment on that, Your Honor, and that would be certainly by back dating it, it would really, from what has been admitted in testimony, really it would only go to the benefit of the defense, because certainly some aspects of that have already been dealt with in terms of an alibi defense.
>
> There's been testimony admitted concerning -- from alleged alibi witnesses -- as late as what Mr. Johnson

> was doing at two o'clock in the afternoon. The defense hasn't restricted itself to attempting to alibi only from five forty-five forward. It already admitted testimony of alibi as early as two o'clock in the afternoon.
>
> THE COURT: We feel that in the absence of a showing of prejudice to the defendant, the Court should not restrict the State to an amendment so as to include the time, testified period of time, testified in the direct examination of the State's witnesses.
>
> Therefore, the motion to amend the Bill of Particulars will be granted. All right.

And that was it. In a case where the defendant was facing life imprisonment plus a term of years.

The defendant was taken completely by surprise. He had been successfully lulled into a defense (alibi, 5:45-8:00 PM) which could give him no defense and leave him helpless.

He was given no opportunity to investigate the time frame of 3:00 P.M., so as to marshall the evidence, prepare subpoenas, interview the witnesses before trial and assure their presence at the trial.

What is very important here is that one of the alibi witnesses inadvertantly covered this time frame. He indicated that the defendant was at a large social gathering during the modified time frame. It was these witnesses who were not able to be marshalled on short notice.

Now, the Judge, sitting also as the trier of facts had heard this testimony. As such he clearly saw the prejudice to the defendant in the preparation of his case. It shouted at him. He he did nothing. This was a situation of prejudice per se, yet he did not even make the slightest inquiry as to whether the defendant was prejudiced.

The Court made no inquiries concerning problems but ruled abruptly. It would have been extremely easy to give the defendant a short continuance to marshall witnesses as there was no jury to inconvenience.

He allowed defense counsel to speak but once and then ruled preemptorily. Surely a

fair trial - the due process of law - requires more than this.

But defendant insists there was prejudice per se. He is now in jail for life. He was deprived of that part of his defense which consists in plea bargaining because he was lulled into a belief as to the weakness of the defendant's case. Certainly an Alford plea would have been contemplated.

When present counsel argued this case orally in the Court of Appeals, much was made of the fact that counsel for defendant did not proffer any additional witnesses that might have been requested or ask for a continuance.

As it turned out, it was this thinking of the three judge panel which provided the ratio decidendi of their opinion (A 6-7), set forth below in haec verba.

"In this case we do not find that Judge Bowling abused his discretion. The alibi testimony, presented by the appellant and

his witnesses, purported to cover the entire period of time stated in the amendment and no proffer was made of any additional witnesses that might have been presented. Nor was any continuance requested for the purpose of seeking to discover any such witnesses or other evidence. In short, there is nothing in the record before us to persuade us that the appellant was in any manner prejudiced by the amendment."

The trial court cannot be allowed to slough off its reponsibility to assure a fair trial entirely upon defense counsel. The prejudice was so obvious here that a little judicial temperment would have cured it.

## CONCLUSION

Judges and lawyers have a dual responsibility in assuring that fundamental fairness and due process is achieved. It is for this reason, in the public interest, as well as for all of the arguments stated above that

a full hearing should be had in this matter and a writ of certiorari directed to the Court of Appeals of the State of Maryland.

Respectfully submitted,

Charles S. Vizzini
Attorney for Petitioner

APPENDIX A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

September Term, 1980

No. 1703

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STEVEN MICHAEL JOHNSON

v.

STATE OF MARYLAND

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Moylan
Melvin
Wilner,
JJ.

---

Per Curiam

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Filed: August 10, 1981

On October 22, 1980, after a two-day court trial in the Circuit Court for Charles County (Bowling, J. presiding), the appellant, Steven Michael Johnson, was found guilty of a sexual offense in the first degree, kipnapping a child under sixteen years of age, and assualt and battery. On November 26, 1980, appellant's motion for a new trial was denied and he was sentenced to life imprisonment for the first degree sexual offense, with concurrent lesser sentences on the other charges.

Appellant presents two questions in this appeal:

> "1. Did the trial court err in failing to grant a new trial based upon newly discovered evidence, to wit, a witness' post trial testimony that he had been misunderstood when he quoted the defendant as stating he should have killed the complaintant when he meant to state that the defendant was speaking of a third party unknown hypothetical criminal in that case?
>
> 2. Did the trial court err in allowing the State to amend its bill of particulars over the defendant's objection at the trial to allege that the crime occurred at 3 P.M.

> instead of the 5:45 to 8 P.M. given in all previous discovery, because the defendant had alibi witnesses for that time frame had it been so earlier advised instead of misadvised?"

As we find no reversible error with respect to either of the questions, the judgments of conviction will be affirmed. In view of the nature of the questions, the relevant facts need be mentioned only briefly as we discuss each question.

I

Motion for New Trial

At trial the State called one Patrick Maurer as one of its witnesses. Maurer, a friend of appellant, testified that two or three weeks before trial, in a conversation with appellant at a bar known as The Tropics, appellant had stated, "I should have killed him", referring to the nine-year old victim of the crimes. On cross-examination by defense counsel, Maurer twice affirmed the correctness of his direct testimony.

One of the grounds for appellant's motion for a new trial was "newly discovered" evidence. It was argued that Maurer did not intend to quote appellant as saying, "I should have killed him", but merely as saying "Should have killed him", without the pronoun "I". Maurer testified at the new trial hearing that appellant, in making that statement (without the pronoun"I") was referring not to himself but to an unknown hypothetical third person, and that he (Maurer) had been "misunderstood" by the State's investigators when they interviewed him before trial.

One of the criteria that must be met to warrant a new trial on the basis of newly discovered evidence is that the evidence must, in fact, be newly discovered after the trial. Jones v. State, 16 Md. App. 472, 477, cert. denied, 268 Md. 750 (1973). The record in the present case clearly reveals that Maurer's desire to change his testimony was discovered

during the course of the trial. When Maurer was recalled as a rebuttal witness on behalf of the State, the following occurred on cross-examination:

> "Q. /Defnese counsel/ Didn't you also tell me you wanted to change your testimony as to what was said in The Topics?
>
> A. /Maurer/ What happened in Topics is --
>
> /State's Attorney/: Objection, Your Honor, to that. I think --
>
> THE COURT: That is beyond the scope.
>
> /Defense counsel/: It goes to credibility, Your Honor.
>
> THE COURT: Well, but at this poing you are dealing with the cross-examination of his testimony. If you wish to call him for that purpose, you may do so. But you are limited in your cross-examination to the matters touching on the --
>
> /Defense counsel/: I think his credibility to testifying to something different, to put it in, as to his credibility --
>
> THE COURT: If you wish to offer it, you may do so in your case. But that is way beyond the scope of the direct examination here."

In ruling on the motion for new trial, the judge, who had heard the case without a jury,

said:

> "As to the issue concerning the testimony of Mr. Maurer, I am not convinced that his purported change is more likely the truth of what happened on the date that he said such a statement was made. I think, based on his testimony today and what he said at the time of the trial, his first statement given is more likely the statement that was actually, in fact, given. I cannot find from the evidence presented and the basis for the motion that a new trial should be granted."

It is well settled, of course, that the granting of a new trial lies within the sound discretion of the trial court and its denial thereof will not be disturbed on appeal except for compelling reasons manifesting a clear abuse of discretion. Couser v. State, 36 Md. App. 485, 495 (1977), aff'd., 282 Md. 125, cert. denied, 439 U.S. 852 (1978). On the record before us, we find no such abuse.

II

Amendment of Bil of Particulars

Prior to trial, pursuant to appellant's request, the State filed a bill of particu-

lars to change the earlier time limit from 5:45 p.m. to 3:00 p.m. At the time of the motion to amend, defense counsel pointed out to the court that the "crux" of appellant's defense was his alibi "and back timing it does work to the prejudice of the defendant."

Maryland Rule 730d provides that, "A bill of particulars may, on motion, be amended at any time subject to the conditions justice requires." We take this to mean that the ruling on the motion is one that is left to the sound discretion of the trial judge. In this case, we do not find that Judge Bowling abused his discretion. The alibi testimony, presented by the appellant and his witnesses, purported to cover the entire period of time stated in the amendment and no proffer was made of any additional witnesses that might have been presented. Nor was any continuance requested for the purpose of seeking to discover any

such witnesses or other evidence. In short, there is nothing in the record before us to persuade us that the appellant was in any manner prejudiced by the amendment."

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

APPENDIX B

IN THE

COURT OF APPEALS

OF MARYLAND

Petition Docket No. 409

September Term, 1981

(No. 1703, September Term, 1981
Court of Special Appeals)

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STEVEN MICHAEL JOHNSON

V.

STATE OF MARYLAND

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ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby,

denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: November 3rd, 1981